

No. 20-1453

In the
Supreme Court of the United States

CAL CARTAGE TRANSPORTATION
EXPRESS, LLC, et al.,

Petitioners,

v.

THE PEOPLE OF THE STATE OF
CALIFORNIA, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The California Court Of Appeal

**BRIEF FOR THE MINNESOTA TRUCKING
ASSOCIATION, AS AMICUS CURIAE
SUPPORTING PETITIONERS**

Kay Nord Hunt
Counsel of Record
Michael C. Glover
LOMMEN ABDO, P.A.
1000 International Centre
920 Second Avenue South
Minneapolis, MN 55402
(612) 339-8131
kay@lommen.com
mglover@lommen.com

Doug Grawe
PO Box 19074
Minneapolis, MN 5419
(515) 450-1860
doug.grawe@thegrawegroup.com

Counsel for Amicus Curiae

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INTEREST OF THE AMICUS CURIAE*

Amicus is a Minnesota based trucking industry trade association. It has long supported the rights of professional truck drivers and motor carriers to choose independent or employee driving opportunities. Amicus offers this brief in support of the Court granting Petitioners' petition so the Court may preserve the rights of professional drivers and motor carriers to choose their own working relationships and business opportunities.

* All parties received timely notice of intent to file this brief at least 10 days in advance of the brief's due date. Blanket consent letters are on file with the clerk. Pursuant to Rule 37.6, amicus curiae affirms counsel for a party authored this brief in whole or in part and no person other than amicus, its members and its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

For over 100 years, the United States trucking industry has offered opportunities for professional drivers with entrepreneurial spirit to own their own business and contract with motor carriers as an owner-operator. Through economic regulation and deregulation, through boom times and fuel shortages, through paper logbooks and electronic onboard recorders, owner-operators provided the flexible capacity and service necessary to meet their own needs as well as those of motor carriers and shippers.

Owner-operators partner with motor carriers to safely move customer freight and protect the motoring public in accord with federal safety regulations. Owner-operators enjoy both the freedom and responsibility to be their own boss, to earn a profit, or suffer a loss. Represented by their own trade association, and protected by state and federal laws, owner-operators proudly have stood the test of time.

Unfortunately, state laws like California's version of the ABC test at issue in this case eliminate the owner-operators' ability to stand the test of time. Eliminating the owner-operator model cuts off a professional driver's right to choose traditional employment or owning his own independent business. It eliminates capacity and service options for motor carriers and shippers as well.

By limiting motor carriers' options and service offerings for shippers, California is improperly regulating motor carriers in a way preempted by federal law. Amicus respectfully requests the Court grant the Petition and preserve professional drivers' rights to choose the career path that works for them and preserves the motor carrier flexibility to offer the capacity and services shippers demand.

ARGUMENT

Americans cherish the freedom to go about their business without overreaching intrusion from government. Government regulation has its place, especially when it comes to safety and fair dealing. But government overreaches when it eliminates the rights of people to choose bona fide careers and pursue business opportunities. California, through Cal. Labor Code § 2775, so overreaches that it eliminates a viable career path for professional truck drivers to own their own trucking businesses as owner-operators. Amicus respectfully requests this Court take this opportunity to stop California's intrusion into professional truck drivers' rights to be an owner-operator business or a traditional employee driver.

I. The owner-operator business model has a long history.

Today, an independent "owner-operator" is a one-person trucking business leasing his truck to a motor carrier. Owner-operator is the term for an individual who owns a commercial motor vehicle

("CMV") and leases that CMV and his driving services to a motor carrier under rules authorized under 49 U.S.C. § 14102 and promulgated at 49 C.F.R. §§ 376.1, *et seq.* (the "Truth-in-Leasing" regulations).

Eliminating the owner-operator model eliminates a critical, long-standing, and protected industry segment. In the 1930's owner-operators transported exempt agricultural commodities and later helped motor carriers expand their motor carrier services in the peak of Interstate Commerce Commission (ICC) regulation. *See* Motor Carrier Act of 1935, 49 Stat. 543, 545 (1935). In the 1970's, owner-operators forced beneficial changes to the industry by protesting gouging fuel prices and spurring fairer fuel pricing policy. Douglas C. Grawe, *Have Truck, Will Drive: The Trucking Industry and The Use of Independent Owner-Operators Over Time*, 35 *Transp. L.J.* 115, 131 (2008). In the 1990's and 2000's, owner-operators sued motor carriers violating lease agreements. *Owner-Operator Indep. Drivers Ass'n, Inc. v. Arctic Express, Inc.*, 270 F. Supp. 2d 990 (S.D. Ohio 2003). Applied to the nation's motor carrier industry, California's ABC test – Cal. Labor Code § 2775 – needlessly eliminates the independent owner-operator trade, one of the oldest trades and entrepreneurial opportunities in California.

Owner-operators date back over 100 years to the beginning of the trucking industry. *See* Paul Stephen Dempsey, *Transportation: A Legal History*, 30 *Transp. L.J.* 235, 273-74 (2003). Congress began regulating motor carriers in interstate commerce

with passage of the Motor Carrier Act of 1935. As a result, owner-operators were forced to haul only “exempt” commodities because they did not have the required federal operating authority to haul anything else. However, owner-operators learned they could access more freight by leasing their trucks with a driver to motor carriers with federal operating authority. This mutually beneficial arrangement allowed owner-operators to expand their business opportunities and provided motor carriers more capacity to serve their shippers. Grawe, *supra* at 122-123.

Congress, courts, and administrative agencies have long recognized the critical role independent owner-operators play in the nation’s transportation system. “[T]he ICC, the body charged with responsibility for developing and maintaining a strong national transport system with the full legislative blessing of Congress, recognizes in a formal and vital way that carriers (common or contract) are entitled to obtain needed equipment and augment fleets to care for increases in traffic by means of leases.” *Agric. Transp. Ass’n of Texas v. King*, 349 F.2d 873, 881 (5th Cir 1965). The owner-operator model has updated with the times but remains strong in much the same form. *See* Minn. Stat. § 176.043 (an example of state statutory recognition of the owner-operator trade). It is critical to today’s demanding supply chain requirements.

“Independent owner-operators are running businesses on wheels. The cabs of the tractors are wired offices. Shippers and motor carriers track the tractor’s location through satellites, communicate

with independent owner-operators through satellite messaging and cell phones, while the independent owner-operators can process paperwork through laptop computers, wireless Internet access, and scanning documents.” Grawe, *supra* at 136.

II. The owner-operator business model is an entrepreneurial melting pot.

For some drivers, their road to becoming an owner-operator is the next mile marker after driving as an employee. *Professional Truck Driver Types*, The Trucker (last visited May 26, 2021), <https://www.thetrucker.com/truck-driving-jobs/resources/professional-truck-driver-types>.

Some grew up around owner-operators and want to continue their family’s legacy. Others become owner-operators because family obligations demand a flexible schedule.

The reasons drivers choose to be independent is as varied as the owner-operators themselves. Among Amicus members, some of their owner-operators are vintage cowboy truckers, some dedicated family-men and women. Some are military veterans. Others are hungry novices with a dream. Owner-operators working with our Amicus members are men and women of all races and backgrounds. Employee drivers considering graduating to owner-operator status seek to answer the challenge of running their own business. Do they possess skills and business acumen to manage finances and expenses, to maximize truck utilization, increase profits, and sustain their own business?

III. The owner-operator business model benefits drivers, motor carriers and shippers.

A. The owner-operator business model benefits drivers.

The owner-operator model benefits drivers. For the owner-operator it allows individuals to start his own business, transport freight with his own truck, and try to maximize profit by finding higher paying loads, limiting empty miles, and lowering fuel and maintenance costs. It also allows the owner-operator to avoid the costly burdens of a motor carrier. Importantly, while the owner-operator maintains independence, by partnering with the motor carrier, the owner-operator obtains the benefit of the motor carrier's regulatory compliance infrastructure, the motor carrier's ability to solicit freight from large shippers, the motor carrier's capital to invest in trailers, technology, and storage yards, the motor carrier's back office to administer billing and collections, and the motor carrier's insurance and reserves necessary to protect the motoring public.

Structurally, the owner-operator enters into a written agreement with the motor carrier. This agreement allows the owner-operator to lease a truck and provide a driver (usually themselves) to the motor carrier. *See Owner-Operator Indep. Drivers Ass'n, Inc. v. Swift Transp. Co., Inc.*, 632 F.3d 1111, 1113 (9th Cir. 2011), *reh'g en banc denied*. "Owner-operators are truck drivers who contract with motor carriers to provide hauling services; they typically own their own equipment and lease out

their trucks and hauling services to carriers” *Id.* Extensive federal truth-in-leasing regulations oversee and control these lease agreements. *See* 49 C.F.R. §§ 376.1, *et seq.* These regulations protect the owner-operator from motor carrier financial overreaching.

In this regulated exchange, the owner-operator enjoys the freedom to make his own operating decisions. He can accept and reject loads, set his own schedule, and make his own equipment and maintenance decisions. The owner-operator trades the stability of wages and employee benefits for higher compensation. The owner-operator has more choices in the marketplace for insurance, benefits, and support services.

Critically, the owner-operator must make a meaningful investment in his business. This includes buying or leasing a truck. It includes purchasing equipment (such as laptops and tablets) to communicate with motor carriers and shippers. Investments include obtaining and installing an electronic hours of service logging device as well as purchasing insurance to protect the truck, the driver, and any operations when not under dispatch to the motor carrier.

The owner-operator must choose the right motor carrier to partner with for his business. The owner-operator must develop a strategy to secure more and better freight opportunities from his motor carrier. The owner-operator needs to execute a fuel purchasing strategy, maximize fuel efficiency, and establish and follow a truck maintenance plan. Those decisions and more determine the owner-

operator's profit or loss, and ultimate success or failure.

Conversely, the employee driver receives a set rate for moving loads dictated by the motor carrier. An employee driver must use the motor carrier's chosen route. An employee driver drives a truck built to the motor carrier's specifications, with only the comforts allowed by the motor carrier, and with the speed controls imposed by the motor carrier. An owner-operator determines his own truck specifications and comforts. The employee driver, in contrast, can only fuel, shower, and rest where the motor carrier permits. Under the owner-operator model, the owner-operator retains control of these decisions. Grawe, *supra* at 126-127.

Many professional drivers choose to be employee drivers. However, a significant number instead choose the challenge of being an owner-operator. For them it is their choice and a career milestone. Of 3.9 million commercial driver license holders in the U.S., between 350,000 and 400,000 are owner-operators.¹ These owner-operators find their niche in the industry by carving out higher rates of compensation, receiving administrative support, and liability protections from motor carriers in exchange for providing equipment and driver services the motor carrier does not, or cannot, provide on its own.

¹ See *Industry Facts*, OOIDA.com (last visited May 26, 2021), <https://www.oida.com/wp-content/uploads/2021/03/Trucking-Facts.pdf>.

B. The owner-operator business model benefits the motor carrier.

For the motor carrier, the owner-operator business model has benefits. Owner-operators offer additional capacity to haul freight for shippers without incurring additional fixed expenses such as truck payments, employee wages, and benefits. However, the motor carrier makes tradeoffs when it decides to utilize employee drivers or owner-operators. As to motor vehicle accident risk and protecting the motoring public, there are no tradeoffs. Whether utilizing an owner-operator or an employee, the motor carrier retains the same accident risk. Those costs are not borne by the owner-operator because the motor carrier maintains legal liability for the acts of all drivers utilizing the motor carrier's operating authority. *See* 49 C.F.R. § 390.5.

As to day-to-day operations and fixed and variable expenses, there are tradeoffs. Owner-operators do not cost motor carriers more or less than employee drivers; the costs are different. In day-to-day operations, motor carriers can maximize efficiencies with employee drivers they do not obtain with owner-operators. Motor carriers can control the details with employee drivers. In an industry with slight margins, the efficient utilization of drivers and trucks makes or breaks the motor carrier's profitability, not the classification of the driver.

By adding owner-operators, motor carriers can, however, offer more capacity, flex for more shipper needs, and accept more freight. By using owner-

operators, motor carriers' operating efficiencies are traded in favor of reduced overhead.

When utilizing an owner-operator, the motor carrier gains relief from fixed expenses such as equipment costs and driver benefits by paying the owner-operator only when they move a load. However, the motor carrier incurs a higher variable rate with owner-operators because the motor carrier must compensate the owner-operator a percentage rate or a mileage rate two to three times higher than the motor carrier would pay its employee driver.

As of December 2020, there were between 500,000 and 600,000 motor carriers in the U.S. across all vehicle classes, providing approximately 4.7 million vehicles on the road.² Between 350,000 and 400,000 of those vehicles belong to owner-operators or single-truck motor carriers.³ Of the top 100 motor carriers, only five utilize owner-operators exclusively, while the rest utilize employee drivers exclusively or some combination. The rest of the industry likely shares a similar breakdown, some utilizing owner-operators solely, and most utilizing either a blend or employees exclusively. *See 2020 Essential Financial and Operating Information for the 100 Largest For-Hire Carriers in North America*, Transport Topics (last visited May 26, 2021), <https://www.ttnews.com/top100/for-hire/2020>.

² See *Industry Facts*, OOIDA.com (last visited May 26, 2021), <https://www.ooida.com/wp-content/uploads/2021/03/Trucking-Facts.pdf>

³ *Id.*

The mix of employee drivers and owner-operators suggests there is no market domination but instead high competition for drivers and owner-operators among motor carriers. Any owner-operator who wants to be an employee driver has many opportunities available and vice versa. Motor carriers want the extra capacity in any form to secure more freight from shippers.

C. The owner-operator business model benefits the shipper.

The owner-operator business model benefits the shipper. The extremely competitive and diverse transportation industry means shippers often must utilize multiple transportation service providers for their freight to be moved efficiently, safely and on-time. The owner-operator business model fills part of that need by allowing motor carriers to serve shippers with supplemental capacity and service needs. This reduces the number of providers a shipper must engage to move its freight.

For example, a shipper may have inconsistent freight volumes, or inconsistent freight origins and destinations. Motor carriers and shippers both struggle to efficiently manage such inconsistency. The shipper may reliably have five loads per week between A and B, but sporadically may ramp up to seven or eight loads per week. The shipper and the motor carrier can manage the five loads, but the sporadic extra loads are difficult to service. Owner-operators solve this problem by offering the periodic flexibility to transport the extra loads, respond to spikes in volume, and service new, erratic, or sparse

markets. *Professional Truck Driver Types*, The Trucker (last visited May 26, 2021), <https://www.thetrucker.com/truck-driving-jobs/resources/professional-truck-driver-types>.

By working together, the owner-operator and the motor carrier can pursue their own business initiatives and serve the variable freight needs of shipping customers.

IV. Existing regulation and trade groups protect and support the owner-operator.

Owner-operators are an industry represented by its own trade association – the Owner-Operator Independent Driver Association (OOIDA). In addition to representing owner-operators in legislative and regulatory policy matters, OOIDA also offers property and casualty insurance, and health and benefit programs. OOIDA also partners with law firms to provide legal support to owner-operators who have been legally harmed by motor carriers and shippers violating the federal truth-in-leasing and other laws. *See, e.g., Owner-Operator Indep. Drivers Ass’n, Inc. v. Supervalu, Inc.*, 651 F.3d 857 (8th Cir. 2011); *Owner-Operator Indep. Drivers Ass’n, Inc. v. Swift Transport. Co., Inc.*, 632 F.3d 1111 (9th Cir. 2011), *reh’g en banc denied*; *Owner-Operator Indep. Drivers Ass’n, Inc. v. New Prime, Inc.*, 339 F.3d 1001 (8th Cir. 2003), *reh’g en banc denied*. These legal actions demonstrate the owner-operator industry is organized, well-funded, and fully capable of protecting its best interests.

In addition to OOIDA, other businesses provide support such as tax and bookkeeping services, insurance and benefits products, fuel optimization technology, route optimization technology, legal services, and more to owner-operators.

Existing broad-based state and federal laws protect owner-operators from motor carrier and shipper bad acts. For example, Minn. Stat. § 363A.17 prohibits businesses from discriminating against any vendor or customer on the basis of race, sex, national origin, color, sexual orientation, or disability. Federal truth-in-leasing laws protect owner-operators from motor carriers taking unauthorized deductions from owner-operator compensation. *See* 49 C.F.R. § 376.12. Federal motor carrier safety regulations protect the motoring public by imposing federal safety requirements on motor carriers and their drivers and owner-operators alike. *See* 49 C.F.R. § 390.5. Existing independent contractor definitions such as the economic realities test, the right to control test, and others, offer standards that protect owner-operators from misclassification and ensure owner-operators can retain the freedom they are allowed under federal motor carrier safety regulations. But California's ABC test provides no protection for trucking owner-operators; it defines them out of existence.

V. The California ABC test cuts service available to shippers and protections available to the public.

Enforcement of California's ABC tests pushes existing owner-operators and motor carriers

operating in or through California into three options: (1) transition to a wholly employee driver model; (2) force owner-operators to obtain their own motor carrier operating authority and obtain a property broker license to broker loads; or (3) leave the industry. None of these options benefit owner-operators, motor carriers or shippers. These options restrict freedoms, reduce protections, and decrease efficiency inside and outside California's borders.

An owner-operator and a motor carrier choosing option one – an employee driver relationship – must decide whether the owner-operator will be an employee only when driving in California, only if the owner-operator lives in California, only if the owner-operator is based out of a terminal in California, or some other criteria. The motor carrier with owner-operators living and operating throughout the U.S. on irregular routes must determine whether to convert all owner-operators to employees because of the potential for moving loads in California from time to time based on unclear thresholds or abandon service to California altogether. The owner-operator loses the freedom to choose his own fuel and shower stops, to set his own work schedule, to pick the truck he wants, and more. The shipper and the motor carrier lose the ability to flex capacity up and down to match shippers' needs. The owner-operators lose the ability to command higher compensation while maintaining the motor carrier's protections.

Alternatively, the motor carrier may choose to interline all freight into and out of California handing trailers and loads off at the California border between owner-operators and employee

drivers. See *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 527 (1959) (describing interline operation of motor carriers). While that may help the motor carrier and the owner-operator comply with California's ABC test, it would decrease utilization, increase truck and driver idle time waiting for handoffs, complicate the movement of freight throughout the United States, and slow the delivery of goods. Courts have recognized the burden conflicting state laws can have on the trucking industry and have ruled federal law must preempt a state law when it imposes too much of a burden on interstate commerce. For example, this Court ruled an Illinois law specifying a certain mudguard design on trucks to be an unconstitutional burden on interstate commerce because it would have required motor carriers to switch out equipment at the Illinois border. *Bibb*, 359 U.S. at 530.

An owner-operator choosing option two forces the motor carrier to obtain property broker authority so the owner-operator can still receive freight transportation business from the motor carrier and its shippers. The motor carrier will need to decide whether to become a broker full-time, across all shipments or to act as a broker to its shippers only for California shipments and a motor carrier for all other shipments. The decision will adversely affect operations, billing rates, insurance, liability, safety, licensing, and virtually every other aspect of the motor carrier's business and its relationships with shippers and drivers.

An owner-operator reincarnating into a one-truck motor carrier lacks the financial wherewithal to invest in more robust safety technology such as rear-end collision avoidance or lane-keep equipment. He lacks meaningful help with regulatory compliance. He lacks the ability to obtain insurance limits higher than the federal minimum of \$750,000, which is insufficient to keep up with today's multi-million verdicts in motor vehicle accident litigation. Further, the original motor carrier (now just a broker) would avoid the motor carrier public financial responsibility cost altogether leaving only the owner-operator's minimum insurance policy as compensation to an injured victim. As a result, eliminating the owner-operator model could, unintentionally, increase risks and financial exposure for the motoring public.

Option three is equally undesirable. An owner-operator leaving the industry is a lost entrepreneurial opportunity drivers desire. It is a lost opportunity for additional capacity motor carriers want. And it is a lost opportunity for service flexibility shippers need.

California's ABC test adversely affects the interstate cargo transportation industry to the core. Interstate commerce requires uniform rules to operate efficiently. Federal law must preempt any state law that intrudes upon, and fundamentally alters a long-standing, proven, and mutually beneficial business model in the interstate trucking industry.

CONCLUSION

The owner-operator model has a long, proud history, serving a vital trucking industry niche. It coexists today with motor carriers as a heavily regulated segment of the industry, but it can never be compatible with California's ABC test. California has pushed this elimination of owner-operators despite the FAAA's preemption of state laws that relate to price, routes, or services of interstate motor carriers. The Court has the opportunity to settle the owner-operator model's future by granting the petition. Amicus respectfully requests the Court take the opportunity and grant the petition.

Respectfully submitted,



Kay Nord Hunt

Counsel of Record

Michael C. Glover
LOMMEN ABDO, P.A.
1000 International Centre
920 Second Avenue South
Minneapolis, MN 55402
612-339-8131
kay@lommen.com
mglover@lommen.com

Doug Grawe
PO Box 19074
Minneapolis, MN 5419
(515) 450-1860
Doug.grawe@thegrawegroup.com